

In dubio contra bellum

Why the prohibition to use force will survive Turkey's operation Peace Spring

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What does Turkey's operation "Peace Spring" against Kurdish militias in Northern Syria and the subsequent reactions of the international community mean for the prohibition on the use of force? "The right to self-defence may be regarded as broadened now," some fear (e.g. [here](#)). But can the law regulating the use of force in international relations change so easily in the face of this intervention and careful reactions of the international community? No, we argue, it cannot. The prohibition to use force is more robust than widely believed.

Turkey's operation is a serious violation of international law (see for example [here](#), [here](#), [here](#) and [here](#)). Still, Turkey [claims](#) it was justified under the right to self-defence. Remarkably, whenever States illegally resort to military force in their international relations, whenever they wrongfully invoke exceptions like the right to self-defence, commentators worry that this behaviour might eventually weaken the validity of the prohibition on the use of force.

Of course, state practice can change international law to the extent that there is corresponding *opinio juris*. If Turkey advances a broader reading of the right of self-defence and if the international community accepts or acquiesces in it, the law may change. State practice and *opinio juris* are the constituting elements of customary international law (CIL). Accordingly, CIL does not only govern the behaviour of states but is at the same time formed by it. Jellinek's formula of the "normative power of the factual" describes this interdependence of reality and normativity in international law to the point. Similar considerations apply to the interpretation and the evolution of treaties. Presumably, it is this interdependence that is one of the main reasons why commentators have [urged](#) the international community to take a strong and unequivocal stand against the Turkish illegal use of force in Northern Syria. Failing to do so in the view of blatant violations of the prohibition on the use of force, they fear, would risk that "this cornerstone [of international law] begins to falter".

But how strong is the normative power of facts when it comes to violations of the prohibition on the use of force and unjustified invocations of exceptions to this rule? After all, the International Court of Justice referred to the prohibition as "[a cornerstone](#)" of the United Nations Charter and it is [considered by many to constitute a peremptory norm](#) of international law.

In general, the threshold for change in international law is high, even for rules of lesser significance. [Article 38 \(1\) \(b\)](#) of the ICJ Statute requires "*general practice accepted as law*". Hence, it is accepted that practice must be consistent and widespread in order to crystallize into CIL. Isolated incidents claimed to be in

accordance with international law (here by Turkey) are not enough. However, there is a certain interdependence between state practice and *opinio juris*. The two requirements are believed to rest on a [sliding scale](#), i.e. when state practice is limited, the identification of customary international law might need to rely to a greater extent on *opinio iuris*, and vice versa. Hence, the international community's reactions can increase the relevance of breaches of international law for a change of the law. If the reactions to Turkey's operation would have been overwhelmingly positive, the significance of the operation for the prohibition on the use of force would be much greater. As the International Law Commission [states](#) (at 139): "[a]cceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice *and those in a position to react to it*" (emphasis added). Thus, when assessing the current status of the prohibition on the use of force and the exception of self-defence, looking at other states' reactions to illegal operations like "Peace Spring" is crucial.

In the case of "Operation Peace Spring" the reactions [were](#) diverse. The Turkic Council [welcomed](#) Turkey's operation. However, most other states took an opposing stand. Liechtenstein [condemned](#) operation "Peace Spring" in clear legal terms, labelling it as an aggression. The Cypriot Minister of Foreign Affairs [called](#) the operation a "gross violation of international law and of the United Nations Charter". The largest number of those states that reacted chose not to use clear and explicit legal terminology for their condemnation. The German Foreign Minister [condemned](#) the operation "in the strongest possible terms" and held that Germany saw no basis in international law for the operation to be "legitimate". The Australian Prime Minister "[condemn\[ed\] Turkey for its invasion](#)", as did [Belgium](#) and others. The Ukrainian Ministry of Foreign Affairs expected Turkey to "adopt the decisions that will contribute to resolving the security and humanitarian problems [within the international legal framework](#)." Other states which employed an even more careful language, expressed worries and concerns and urged Turkey to find a non-military solution (see for example [China](#), [Latvia](#) and [Ireland](#)).

What is the legal significance of the reactions with regard to the prohibition on the use of force and the exception of the right to self-defence? It is clear for those statements that expressly condemn Turkey's intervention as *violation*. Unequivocal condemnations not expressly based on legal considerations, however, are more difficult to assess. They require interpretation ([comments to Draft Conclusion 10](#)). We argue that in order to do so in a manner adequate to the events and the law governing these events, one should take into account the nature and the value of the prohibition to use force and the right to self-defence.

As far as the right to self-defence is concerned, it is an exception to the prohibition on the use of force. Exceptions to any prohibition must be construed restrictively. This interpretive rule of caution is found in early ([PCIJ, Nationality Decrees Issued in Tunis and Morocco](#), at 25), as well as more recent ([ECtHR, Litwa v. Poland](#), at para. 59) international jurisprudence. The ratio is that the norm's validity claim must not be mitigated by an (overly broad understanding of an) exception. In consequence, we argue that reactions of the international community to an obviously unjustified invocation of an exception must be understood in a way that does justice to the

norm's validity claim. Unless the reactions are expressly commending the use of force, they should be understood as seeking to prevent an expansion of the exception. The more important the respective norm is, the less it matters *how* members of the international community condemn its violation in terms of legal precision. If there is condemnation, this condemnation must – for the sake of preserving the norm – be understood to qualify the respective action as illegal.

Moreover, the need to apply such an interpretive “rule of doubt” to reactions to unjustified uses of force also flows from the rule's *ius cogens* character. Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm as a norm from which the international community of states as a whole considers no derogation possible. Put positively, *ius cogens* norms express an exceptionally high validity claim. Thus, when states criticise a violation of *ius cogens* without expressly calling it a violation of law, we argue that such criticism should still be interpreted in a way that upholds the norm.

In the current situation, it is clear that political considerations led those states who did not expressly invoke the prohibition to use force to do so. After all, Turkey is a member of NATO and [threatened](#) to “open the doors” and send the Syrian refugees into the European Union. Still, one should be careful to assume that even these states do not want to hold on to a strict prohibition on the use of force. In fact, when seen in the light of the importance of the prohibition, their criticism constitutes a compromise between their *opinio juris* and political necessities that prohibit them from expressing it in the desired clear way.

To be clear: We do not claim to take violations of international law lightly – especially when the violated norms are of crucial importance to international peace. Violations of international law must always be condemned in the clearest way possible. However, if States phrase disapproval more carefully for reasons of (perceived) political necessities, this does not necessarily signify the beginning of the end of a prohibition or even just a new understanding of the rule in question. More awareness in that respect can contribute to upholding the rule in the face of violations, safeguarding its validity and in the process sharpening its contours.

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